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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984
No. _____

CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC),

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and WCCO RADIO, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 19, 1984.

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QUESTION PRESENTED

Whether the Court of Appeals properly affirmed a Federal Commmunications Commission decision requiring the City of New York's Municipal Broadcasting System to demonstrate that its nighttime service applications warranted a waiver of the FCC's "fundamental allocation policy," when the Commission's Clear Channel Rules delineating that policy specifically provided that a "public interest" standard would govern its decision on the applications?

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OPINIONS BELOW

The opinion of the Court of Appeals affirming the Federal Communications Commission (FCC) is reported at 744 F.2d 827 (1984) and is reproduced in the appendix at 1. The decision of the Federal Communications Commission is reported at 91 FCC2d 635 (1982) and is reproduced in the Appendix at 39. The Memorandum Opinion and Order of the

FCC denying WNYC's Petition for Reconsideration (FCC 83-232) (May 19, 1983) is reproduced in the Appendix at 64. The decision of the Administrative Law Judge, reported at 91 FCC2d 659 (1978), is reproduced in the Appendix at 74.

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1984. This petition for certiorari has been filed within 90 days of that judgment. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1) and Rule 20(2) of the Supreme Court Rules.

STATUTES AND REGULATIONS INVOLVED

Statute:

47 U.S.C. §307(b):

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand or the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several

States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Regulations:

Clear Channel Broadcasting, 31 FCC 565 (1961), 605-06.

Section 3.25, Note 2:

In view of special circumstances arising from a service during some nighttime hours by a class II station opeating on 830 kHz at New York, N.Y. (i.e. from 6 a.m. to local sunrise and from sunset at Minneapolis to 10 p.m. e.s.t.), applications will be accepted for such operation: Provided, that they will be acted upon only after and in light of the decision reached in Docket No. 11227.

47 CFR §73.25(a) Clear Channels; Classes I and II stations:

Note 1: Questions relating to the use of 830 kHz for a Class II station at New York, New York, which are pending in Docket Nos. 11227 and 17588 will be decided in that consolidated proceeding.

[Adopted June 20, 1980; see Clear Channel AM Broadcasting, 78 FCC2d 1345, 1379 (1980).]

STATEMENT OF THE CASE

This case involves a dispute over the proper nighttime use of a clear channel AM radio frequency, and presents important questions regarding the proper method of applying the Federal Communications Commission's clear channel rules and policies. WNYC-AM is a municipally owned and operated radio station serving New York City on 830 kHz. It has been operated non-commercially since 1924 and is completely devoted to public service. In the Commission's words, "no other radio station presents anything comparable to WNYC's extensive range of public hearings, United Nations affairs, or the foreign press." In re City of New York Municipal Broadcasting System (WNYC), 91 FCC2d 635, 643 (1982). Approximately 45% of WNYC's schedule is devoted to news, public affairs and other informational programming, 35% to classical music, and 20% to spoken word presentations, such as programs for children, for the aged, and for women. Id., 640-41.

WNYC is regularly licensed to operate only between local sunrise in New York City and local sunset in Minneapolis because of the nighttime interference it causes to the secondary service area of WCCO-Minneapolis, a radio station which is also licensed to broadcast on 830 kHz. Id., 637. (A clear channel's "secondary service area" is generally a circular area some 700-750 miles in diameter around the clear channel transmitter, and encompasses areas which could receive a usable nighttime signal some 50% of the time. Id., 640, n. 19) The restrictions limit (in eastern standard time) WNYC's sign-on time from 4:30 a.m. in June and July to 7:15 a.m. in December and January, and limit sign-off time from 5:30 p.m. in December to 9:30 p.m. in June and July (id., 637), thereby sharply limiting WNYC's availability to those who work during the day. The WNYC nighttime operations which are at issue in this case do not cause interference to reception in the area toward which WCCO aims its programming (its "primary service area"). Rather, the operations interfere with reception in areas

distant from Minneapolis, all of which receive at least ten other similar "secondary" radio services in addition to that of WCCO. Id., 640.

Since 1943, pursuant to a series of annual Special Service Authorizations ("SSA's"), the FCC has permitted WNYC to operate from 6:00 a.m. to 10:00 p.m. In 1954, the FCC designated WNYC's application for a continuance of its SSA for hearing (Docket No. 11227), and extended the SSA pending final decision. This case involves a challenge to the FCC's final resolution of that application, some thirty years subsequent to its initial designation for hearing.

The Hearing Examiner initially assigned to the case issued a ruling in 1957. In re City of New York Municipal Broadcasting System (WNYC), 15 Rad. Reg. (P & F) 565. She determined that while WNYC-AM could not broadcast at night under Commission rules, WNYC served "special and compelling needs and requirements" which did "not cease with the setting of the sun in Minneapolis." 15 Rad. Reg. (P&F) at 639. She recommended that

WNYC's SSA application to operate at night be granted, and that the issue of regular licensing for the nighttime service be deferred pending the Commission's decision in the "Clear Channel case," a proceeding involving a redetermination of the Commission's fundamental frequency allocation policies regarding AM broadcasting. Id. Accordingly, the Commission took no action on WNYC's application until the clear channel issues were resolved.

The Commission issued its Clear Channel Decision and Rules in 1961. In re Clear Channel Broadcasting in the Standard Broadcast Band ("Clear Channel Broadcasting"), 31 FCC 565, reconsideration denied, 45 FCC 400 (1962), aff'd sub nom. Goodwill Stations, Inc. v. FCC, 325 F.2d 637 (D.C. Cir. 1963). The 1961 amendments authorized full-time stations on the majority of the previously protected twenty-five class 1-A clear channels. Assignment of additional stations to 830 kHz was deferred pending adjudication of the administrative hearings on WNYC's application. In its clear channel decision

the Commission also stated that it would not approve any nighttime assignment on any class 1-A frequency unless the subordinate station protected the dominant station's secondary service area. Id., 31 FCC at 581-582.

Because WNYC could not so protect WCCO, the Commission added a note to its allocation rules (§3.25, Note 2) authorizing WNYC's application for nighttime operations. Id., 605-06. The Commission's decision provided for a determination in an adjudicatory proceeding of whether "such operations are in the public interest." Clear Channel Broadcasting, supra, 31 FCC at 591. The Commission stated the issue to be decided as "whether, balancing the interference caused to WCCO against the service WNYC renders during nighttime hours, the public interest would be served by continuing to permit WNYC's nighttime operation, for which no provision is made in the AM rules governing the use of Class I-A frequencies." Id. The issue was similarly framed in many procedural orders of the Commission in the

proceedings here under review. See, e.g., In re City of New York Municipal Broadcasting System (WNYC), 8 FCC 2d 1047, 1050 (1967); see also 11 FCC2d 287, 298 (Review Board 1968); 29 FCC2d 244, 247 (1971).

In 1963, the FCC remanded Docket 11227 to the Hearing Examiner for updating of the record. In re City of New York Municipal Broadcasting Sytem (WNYC), 1 Rad. Reg. 2d (P&F) 463, 464-65. Since the Commission had previously recognized in its order disposing of petitions for rehearing in the clear channel proceeding* that WNYC could operate nighttime from a different transmitter site and with a different directional pattern which would result in less interference to WCCO than under its SSA proposal, in 1964, WNYC applied for a construction permit and asked permission to broadcast at 50 kw from a new site on Staten Island from 6 a.m. to 10 p.m. Although the Commission had invited this

*Clear Channel Broadcasting, supra, 45 FCC at 410.

application, certain technical aspects of the application were not specifically provided for in the 1961 amendments to the Clear Channel Rules. As a result, WNYC was arguably required to apply for a waiver of the rules for the construction application to be accepted. This waiver was granted in 1965 (In re City of New York Municipal Broadcasting System, 1 FCC2d 1370, 1374) and the construction permit application was set down for hearing in conjunction with the application for continuation of the SSA.

The Administrative Law Judge issued his supplemental initial decision in June, 1978. In re City of New York Municipal Broadcasting System (WNYC), 91 FCC2d 659. It granted the WNYC application for permanent nighttime authority, new antenna array, and 50 kw operating power, and dismissed as moot its application for the special service authorization. The decision contains factual findings in favor of WNYC's application on virtually every issue. In particular the Administrative Law Judge found that WNYC's programming meets

special needs and requirements of the populations and areas to be served; that other stations do not carry public interest programs of the type, magnitude or depth provided by WNYC; and that its "operations provide a unique municipally-coordinated service to the primary service area populations not otherwise available. Many of the programs enumerated must continue beyond the daylight hours or remain incomplete." 91 FCC2d at 774-776. In the areas in which WCCO's signal would receive interference, the Administrative Law Judge found that WNYC's proposals would cause no objectionable interference to the primary service contour of any existing or proposed operation—i.e., "the number of available aural services within the various objectionable interference areas are independent of WNYC's operation." Id., 703. With regard to the secondary service areas in which there would be interference, "there are more than ten other secondary services available" — "thus all of the above objectionable interference areas are already well-served." Id., 705.

In its decision reversing the Administrative Law Judge, the Commission similarly found WNYC's programming to be unique. In re City of New York Municipal Broadcasting System, 91 FCC2d 615, 643 (1982):

> No other station appears to present anything comparable to WNYC's extensive coverage of public hearings, United Nations affairs, and the foreign press. Apparently no other station offers the equivalent of WNYC's festival format for intensive exploration of public affairs and cultural subjects, and no other AM station in the city carries National Public Radio programming. Moreover, in some areas, such as programming concerning veterans, children, the handicapped, and aging, WNYC seems to have provided programming of significantly greater depth than that of the rest on the market. SSA hours are used for at least some of these programs.

The Commission accepted the Administrative Law Judge's findings that WNYC's proposals would cause no interference to WCCO's primary service area, and that at least ten other secondary services were available in all of the areas of secondary interference. Id. at 639-40 and at n. 14. The

Commission, however, did not weigh the programming gains and losses of the respective competing areas. 91 FCC2d at 648. Rather the Commission stated that WNYC's nighttime service "is not essential to serve special needs and requirements" and that it had therefore "not met the heavy burden of justifying a waiver of the fundamental allocation policy involved here." Id.

The SSA hours are critical for WNYC to meet its public service obligations. The early morning hours are essential for providing National Public Radio broadcasts, public information bulletins, and traffic and transit information to morning commuters; the evening SSA hours are similarly essential to provide in-depth news and public interest programs for those who work during the day, as well as for children's programs. Loss of this programming, which the Commission not only found sufficiently worthy over the past 40 years so as to warrant repeated issuance of SSA's, but also exceptionally valuable in the adjudicatory proceedings in this case, will be severely

detrimental to the residents of the New York City metropolitan area. The Commission's rationalization that programming on WNYC-FM can be cut back to accommodate what is special and unique to WNYC-AM utterly ignores the public interest character of the FM station. Moreover, the FM station's schedule and format are designed for, and reach, a different listener audience from that of the AM station. Loss of such a resource without even an attempt to weigh the alternative loss in the WCCO secondary service area is utterly without rational basis.

REASONS FOR GRANTING THE WRIT

THE CLEAR CHANNEL RULES SPECIFICALLY PROVIDED FOR THE FILING OF WNYC'S NIGHTTIME SERVICE APPLICATIONS. THE COMMISSION AND THE COURT OF APPEALS ERRED IN REQUIRING THE STATION TO JUSTIFY WAIVER OF THE BASIC FREQUENCY ALLOCATION POLICIES WHEN THE COMMISSION HAD AUTHORIZED THE APPLICATIONS IN THE FORMULATION AND PUBLICATION OF THOSE POLICIES.

(1)

When the Federal Communications Commission issued its report and order in the clear

channel proceeding (Clear Channel Broadcasting, supra, 31 FCC 565), the Commission determined that the regularization of WNYC's nighttime operations would be decided under a "public interest" standard — i.e., by balancing the gains in WNYC's service area against the losses in WCCO's. The Commission stated (31 FCC at 591-92):

> 75. Since 1943, WNYC, a municipally owned and operated station in New York City, has been permitted under a series of temporary authorizations to operate on 830 kc during certain nighttime hours: 6 a.m. (e.s.t.) to local sunrise and from sunset at Minneapolis to 10 p.m. (e.s.t.), with power of 1 kw. (WNYC's regularly licensed limited-time operation on 830 kc is at 1 kw power, with a different directional antenna.) Nothwithstanding the directional antenna employed, WNYC's operation during nighttime hours causes interference within the secondary service area of WCCO at Minneapolis. In a pending adjudicatory proceeding (docket No. 11227) consideration is being given to the question of whether, balancing the interference caused by WCCO against the service WNYC renders during nighttime hours, the public

> interest would be served by continuing to permit WNYC's nighttime operation for which no provision is made in the AM rules governing the use of class I-A frequencies.
>
> 76. We do not here decide upon or prejudice the decision in those adjudicatory proceedings. In one pertinent respect, however, it is appropriate to take action in this proceeding by way of amending the clear-channel rules to establish the basis for the regular licensing of WOI's presunrise operations and WNYC's nighttime operations so that in the event it is decided in the adjudicatory proceedings that such operations are in the public interest the way will be clear procedurally for the application to be filed for such operations on a regular basis.

Accordingly, the Commission adopted "Note 2" to its clear channel rules (quoted at page 3, supra) which provided that WNYC's applications would be accepted for filing but acted upon only after a decision in the adjudicatory proceeding. During the lengthy proceedings, the Commission repeatedly reiterated that its Clear Channel Rules authorized the applications, that there were no procedural bars, and that the applications would be decided on their

merits.* For example, in its 1963 memorandum opinion and order remanding the special service authorization issue for supplementation of the then stale record, the Commission stated that the rule "permits WYNC to file an application for the regular licensing of the pre-sunrise and evening operations." In re City of New York Municipal Broadcasting System (WNYC), 1 Rad. Reg. 2d (P&F) 463, 464-5 (1963). Similarly, when WCCO filed objections to the City's application for a construction permit to move its transmitter site to Staten Island — an application invited by the Commission as a way to reduce the interference below the level emanating from its existing site — the Commission ruled that the new proposal would be decided "on its merits," and that any technical

*The wording of the note was amended in a 1980 order revising the Clear Channel Rules, but its substance was not affected. Clear Channel AM Broadcasting, 78 FCC 2d 1345, recon. den., 83 FCC 2d 216 (1980), aff'd sub nom. Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982). See p.3, supra, for the current text.

violations of Commission rules would be waived. In re City of New York Municipal Broadcasting System, 1 FCC2d 1370, 1373-74 (1965). In 1967 the Commission stated that note 2 to section 73.25 (former sec. 3.25) had provided "for an ultimate regularization, one way or another, of WNYC's operating schedule." In re City of New York Municipal Broadcasting System, 8 FCC2d 1047, 1051. Similarly, in 1968, the review board stated:

> The Commission made provision for applications for permanent operation for 830 kHz (to operate daytime and certain nighttime hours), upon which WCCO is the dominant station, if such applications met certain technical standards and were otherwise in the public interest. [Footnote omitted] [11 FCC 2d at 298.]

Nowhere is there any indication that WNYC would be required to demonstrate that its applications warranted waiver of the fundamental allocation policies underlying the Clear Channel Rules.

In sum, the Commission determined in 1961 and so provided in its rules that the use of 830 kHz would be governed by the outcome of the

adjudicatory proceeding, and that the Clear Channel Rules and the corollary protection of the secondary skywave contour would not pose insurmountable hurdles to WNYC's nighttime operations. Thus the question litigated in the proceeding was whether WNYC's programming sufficiently served special needs which outweighed the needs of the populations which would otherwise be served by WCCO. This was not only the case litigated — it was the case which WNYC won. For not only both hearing examiners, but the Commission also acknowledged that a) WNYC's programming was extraordinary and catered to an extraordinarily large and diverse audience, and b) that the interference area was well served by at least ten other secondary services similar to that of WCCO.

The Commission committed itself to a specific set of rules in 1961 which provided for WNYC's application. In so doing, the Commission recognized that WNYC's nighttime operation might not run afoul of the basic purpose of the Clear Channel Rules—to ensure an adequate level of radio services

to underserved areas of the country. Clear Channel Broadcasting, 31 FCC at 575. The Commission may not, some twenty years later, rewrite its rules to justify a refusal to weigh the evidence and actually determine which of the two competing services provides the most "fair, efficient and equitable" use of the frequency. 47 U.S.C. §307(b).

(2)

The waivers upon which the Court of Appeals relied in holding that the FCC properly applied a waiver standard did not relate to the Commission's fundamental allocation policies. The Court of Appeals refers (744 F.2d at 836, Appendix at 19) to the fact that on July 7, 1964, WNYC filed a petition for waiver of the Commission's rules, citing In re City of New York Municipal Broadcasting System (WNYC), 1 FCC2d 1370, 1371 (1965). A reading of this 1965 order clearly demonstrates that the waiver applications referred to were 1) waiver of the Commission's rules relating to a freeze on applications (section 1.571 of the Commission's rules)

and 2) a waiver of the rules so as to authorize an application for 50 kw of power daytime — an application not contemplated by the Commission in its Clear Channel Rules, but clearly responsive to the Commission's invitation to WNYC in its disposition of the petitions for rehearing in the clear channel proceeding. Clear Channel Broadcasting, supra, 45 FCC at 410. These technical waivers were granted in the Memorandum Opinion and Order of November 17, 1965, supra, (1 FCC 2d at 1374), and did not involve "fundamental allocation policy."

The Court of Appeals refers (744 F.2d 836-7, Appendix at 20) to a similar technical, but hardly basic Commission reference to a waiver in a 1972 order framing issue 6 in the proceeding, 33 FCC2d 285, 289 (1972). This issue related to the note to Section 73.24(b) of the Commission's rules, which concerns the strength and coverage of an applicant's signal.* This note does not reflect or touch upon

*The text of the note is set forth at 91 FCC 2d at 713.

basic Commission allocation policy. The issue is described thoroughly by the Administrative Law Judge at 91 FCC2d 710, ¶¶143 to 158, and was not reversed by the Commission.*

(3)

There can be no doubt that the Commission decided this case under the standard it applies in determining applications for waivers. It stated in its decision:

> All told, we conclude that the limited AM operations as supplemented by the FM operation should be sufficient to meet the realistic special needs of New York City and that WNYC has not met the heavy burden of justifying a waiver of the fundamental allocation policy here.[52]
>
> [52]See WAIT Radio v. FCC, 459 F.2d 1203 (D.C. Cir. 1972).

In re City of New York Municipal Broadcasting System (WNYC), 91 FCC 2d at 648. The "waiver

*The Commission adopted all the findings and conclusions of the Administrative Law Judge except those specifically rejected or modified. 91 FCC 2d at 639, n.14. The Commission discussed this particular rule at 91 FCC 2d at 638, n. 10.

standard" articulated in WAIT v. FCC is heavy indeed. An applicant must demonstrate either that its application violates the letter of a rule, but not the policy underlying its adoption; or if the policy is indeed violated, the applicant must demonstrate compelling countervailing considerations. This standard is far different from the "public interest" standard to which the Commission committed itself when it formulated the Clear Channel Rules — i.e., to weigh the relative gains and losses to the listening public in the respective service territories of WNYC and WCCO. Similarly, the standard of review in a waiver case is far different from that in a public interest case — in the former, the applicant "must show that the Commission's reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion," WAIT v. FCC, supra, 459 F.2d at 1207; in the latter, the question is one of substantial evidence.

The Court of Appeals committed clear error in upholding the Commission's reliance on its waiver powers and in failing to require the Commission to

weigh the relative gains and losses in the respective listening areas of WNYC and WCCO. The error was significant and prejudicial. The Commission found that WNYC's programming was special and in many ways unique. No similar findings were or could have been made regarding WCCO's. Moreover, the Commission failed to address the significance of the fact that the residents of the interference area all receive at least ten other secondary services. The Commission thereby failed to address the question of how WNYC's applications would interfere with the purpose of protecting secondary service areas — to provide an adequate level of radio service to underserved areas. The Commission's decision thus cannot be reconciled with its statutory mandate to ensure a "fair, efficient and equitable distribution of radio service". 47 U.S.C. §307(b). The Court of Appeals should have remanded the matter to the Commission for a proper determination. See Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331-333 (1976); NLRB v.

Food Store Employees Union, Local 347, 417 U.S. 1, 9-10 (1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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